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SEP 14 2006

OFFICE OF PETITIONS

In re Application of	:	
Elsley	:	
Application No. 10/089,362	:	Decision on Application
Filing Date: January 14, 2003	:	For Patent Term Adjustment
Attorney Docket No. 355908-2650	:	

This is a decision in response to "APPLICATION FOR PATENT TERM ADJUSTMENT UNDER 37 CFR 1.705," filed March 23, 2006. The paper requests correction of the patent term adjustment from one hundred eighty-five (185) days to four hundred forty-three (443) days.

The application for patent term adjustment is **granted**.

The Office has updated the PAIR screen to reflect that the correct Patent Term Adjustment (PTA) determination at the time of the mailing of the Notice of Allowance is four hundred forty-three (443) days. A copy of the updated PAIR screen, showing the correct determination, is enclosed.

On January 23, 2006, the Office mailed a Determination of Patent Term Adjustment under 35 U.S.C. 154(b) in the above-identified application. Applicant was advised of a patent term adjustment to date of 185 days. In response, applicant timely¹ filed the instant request for reconsideration of the patent term adjustment. Applicant requests that the patent term adjustment be corrected to four hundred forty-three (443) days. Applicant asserts that the Office's delay pursuant to 37 C.F.R. § 1.703(a)(2) should be calculated as 443 days, not 327 days and applicant delay should be calculated as 0 days, not 142 days.

Applicant asserts that no circumstances exist within the prosecution of this application that may be considered as resulting in a failure to engage in reasonable efforts to conclude examination of the present application. Applicant states that the patent issuing from the application is not subject to a terminal disclaimer.

¹ PALM Records indicate that the Issue Fee payment was received on March 26, 2006.

The application history has been reviewed and it has been determined that the initial patent term adjustment of 185 days is incorrect.

Applicant asserts that the patent term adjustment should not have been reduced by applicant's delay in filing a reply to the non-final Office action mailed February 4, 2005. The Office contended that a reply was received on September 23, 2005. Therefore, the Office charged applicant with 142 days of delay.

Applicant contends that a reply was timely filed via United States Postal Service (USPS) Express Mail on April 29, 2005. The Office has no record of receiving the April 29, 2005 reply.

On September 23, 2005 applicant filed a copy of the amendment purportedly filed on April 29, 2005 with a copy of Express Mail label receipt no. EV576633837 that cites a date-in of 4/29/05 and contains a postal stamp of APR 29 2005 affixed thereto. The same Express Mail receipt no. is listed on the amendment purportedly filed on April 29, 2005. Applicant did not specifically file a petition under 37 CFR 1.10(e) on September 23, 2005. However, petitioner did provide the evidence to show the September 23, 2005 amendment was a copy of an amendment mailed via Express Mail on April 29, 2005.

Paragraph (e) of 37 CFR 1.10 states that:

Any person mailing correspondence addressed as set out in 1.1(a) to the Office with sufficient postage utilizing the "Express Mail Post Office to Addressee" service of the USPS, but not received by the Office, may petition the Commissioner to consider such correspondence as filed in the Office on the USPS deposit date, provided that:

- (1) The petition is filed promptly after the person becomes aware that the Office has no evidence of receipt of the correspondence;
- (2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail";
- (3) The petition includes a copy of the originally deposited paper(s) or fee(s) that constitute the correspondence showing the number of the "Express Mail" mailing label thereon, a copy of any returned postcard receipt, a copy of the "Express Mail" mailing label showing the "date-in," a copy of any other official notation by the USPS relied upon to show the date of deposit, and, if the requested filing date is a date other than the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS, a showing pursuant to paragraph (d)(3) of this section that the requested filing date was the date the correspondence was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day; and
- (4) The petition includes a statement which establishes, to the satisfaction of the Commissioner, the original deposit of the correspondence and that the copies of the correspondence, the copy of the "Express Mail" mailing label, the copy of any returned postcard receipt, and any official notation entered by the USPS are true copies of the originally mailed

correspondence, original "Express Mail" mailing label, returned postcard receipt, and official notation entered by the USPS.

The Office considers the date the paper or fee is shown to have been deposited as "Express Mail" to be the "Date In" on the Express Mail label, MPEP 513. That is the date that verifies that the package was actually mailed. In view of the above, the evidence is convincing that the reply was deposited as "Express Mail" with the US Postal Service on April 29, 2005.

Accordingly, the amendment received in the Office on September 23, 2005 should have been considered as filed on April 29, 2005. Applicant should not have been charged with 142 days of delay in replying to the Office action mailed February 4, 2005.

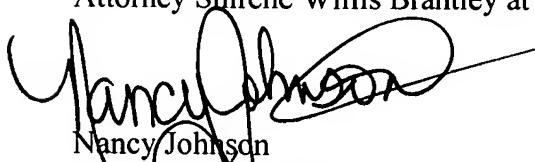
Therefore, the Office delay in mailing the Notice of Allowance is 116 days. (Four months from the April 29, 2005 amendment or August 29, 2005 to December 23, 2005, which is the date the Notice of Allowance was mailed.)

In view thereof, the correct determination of patent term adjustment at the time of the mailing of the Notice of Allowance is four hundred forty-three (443) days.

Submission of the \$200.00 fee set forth in 37 CFR 1.18(e) is acknowledged. No additional fee is required.

The application file is being forwarded to the Office of Patent Publication for issuance of the patent. The patent term adjustment shown on the patent (and in the Issue Notification mailed approximately three weeks prior to issuance) will include any additional patent term accrued pursuant to sections 1.702(a)(4) and 1.703(b).

Telephone inquiries regarding this communication should be directed to Senior Petitions Attorney Shirene Willis Brantley at (571) 272-3230.


Nancy Johnson
Senior Petitions Attorney
Office of Petitions

Enclosure: Copy of Revised Pair Screen

Day : Thursday

Date: 9/14/2006

PALM INTRANET

Time: 09:00:57

PTA Calculations for Application: 10/089362

Application Filing Date:	01/14/2003	PTO Delay (PTO):	327
Issue Date of Patent:		Three Years:	0
Pre-Issue Petitions:	0	Applicant Delay (APPL):	142
Post-Issue Petitions:	0	Total PTA (days):	443
PTO Delay Adjustment:	258		

File Contents History

Number	Date	Contents Description	PTO	APPL	START
44	09/14/2006	ADJUSTMENT OF PTA CALCULATION BY PTO	142		
43	09/14/2006	ADJUSTMENT OF PTA CALCULATION BY PTO	116		
32	12/23/2005	MAIL NOTICE OF ALLOWANCE			
31	12/20/2005	ISSUE REVISION COMPLETED			
30	12/20/2005	NOTICE OF ALLOWANCE DATA VERIFICATION COMPLETED			
29	12/20/2005	CASE DOCKETED TO EXAMINER IN GAU			
28	12/20/2005	NOTICE OF ALLOWABILITY			
27	09/23/2005	OATH OR DECLARATION FILED (INCLUDING SUPPLEMENTAL)			
26	10/13/2005	DATE FORWARDED TO EXAMINER			
25	09/23/2005	RESPONSE AFTER NON-FINAL ACTION		142	20
22	03/30/2005	CORRESPONDENCE ADDRESS CHANGE			
21	01/27/2005	INFORMATION DISCLOSURE STATEMENT (IDS) FILED			
20	02/04/2005	MAIL NON-FINAL REJECTION	327		-1
19	02/03/2005	NON-FINAL REJECTION			
18	01/21/2005	IFW TSS PROCESSING BY TECH CENTER COMPLETE			
16	01/21/2005	CASE DOCKETED TO EXAMINER IN GAU			
15	03/01/2004	INFORMATION DISCLOSURE STATEMENT (IDS) FILED			
14	01/14/2003	371 COMPLETION DATE			
13	06/15/2004	APPLICATION DISPATCHED FROM OIPE			
12	06/15/2004	NOTICE OF DO/EO ACCEPTANCE MAILED			
11	01/14/2003	ADDITIONAL APPLICATION FILING FEES			
9	04/17/2003	PRELIMINARY AMENDMENTS			

8	01/14/2003	A STATEMENT BY ONE OR MORE INVENTORS SATISFYING THE REQUIREMENT UNDER 35 USC 115, OATH OF THE APPLIC			
7	03/05/2004	WITHDRAW PRE-EXAM ABANDON			
6	05/27/2004	PETITION TO REVIVE APPLICATION - GRANTED			
5	01/14/2003	PETITION ENTERED			
4	04/30/2004	CLEARED BY OIPE CSR			
3	03/04/2004	ABANDONMENT -- INC. APPLICATION UNDER RULE 53(B) - FILING FEE PAID			

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EXPLANATION OF PTA CALCULATION

EXPLANATION OF PTE CALCULATION

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